A

## MAHABUILDERS BERHAD

**v.**

## HOTEL RASA SAYANG SDN BHD

B

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL RAHMAN SEBLI J
[SUMMON NO: 22NCVC-486-11-2012]
25 FEBRUARY 2014

C ***CONTRACT:*** *Offer - Counter offer - Sale and purchase agreement - Draft agreement prepared by vendor - Inclusion of new terms in draft agreement by purchaser - Whether inclusion of new terms amounted to counter offer - Whether nullified vendor's offer - Whether plaintiff's claim for specific performance allowed*

D ***CONTRACT:*** *Specific performance - Sale and purchase agreement - Draft agreement prepared by vendor - Inclusion of new terms in draft agreement by purchaser - Whether inclusion of new terms amounted to counter offer - Whether nullified vendor's offer - Whether plaintiff's claim for specific performance allowed*

E

The plaintiff and the defendant ('the vendor') had agreed to enter into a sale and purchase agreement in respect of a piece of land together with a building erected thereon. The agreed purchase price was RM19 million and the plaintiff had to pay a deposit of F RM1.9 million towards the purchase price. The cheque for RM1.9 million, however, could only be released to the defendant upon the execution of the sale and purchase agreement by both parties. In light of this, the defendant's solicitors had forwarded a draft sale and purchase agreement to the plaintiff's solicitors. The said G draft was returned to the defendant's solicitors and a new cl. 3A was inserted which consisted of four entirely new terms. These terms were not accepted by the defendant and they objected to it, resulting in the cancellation of the draft agreement. Dissatisfied, the plaintiff filed this suit for specific performance of the sale and H purchase agreement since it contended that the defendant had no rights to cancel the draft agreement as there was already a concluded contract between the parties. It was also argued that cl. 3A was not a fundamental term and that if the defendant had informed the plaintiff of its disagreement prior to the cancellation, I the plaintiff would have agreed to withdraw the said cl. 3A. The issues that arose for consideration, *inter alia*, were: (i) whether the

plaintiff had abrogated the defendant's offer by adding new terms to the draft sale and purchase agreement which led to a failure of acceptance within the meaning of s. 7(a) of the Contracts Act 1950; and (ii) whether the inclusion of cl. 3A by the plaintiff amounted to a counter offer and if so, whether it had the effect of nullifying the proposal made by the defendant.

**Held (dismissing plaintiff's claim with costs):**

**(1)** The introduction of a new term may be considered as a counter offer which destroys the original offer. This view accords with s. 7(a) of the Contracts Act 1950 which requires acceptance to be absolute and unqualified. Clause 3A was a material variation from the draft agreement. The plaintiff's acceptance of the proposal was not absolute as it was conditional upon the defendant agreeing to the new cl. 3A. (paras 13 & 14)

**(2)** By introducing cl. 3A, it reversed the role of the plaintiff from being an offeree to that of an offeror. If the defendant were to accept the plaintiff's counter-proposal, it would be a contract on terms offered by the plaintiff. Since the defendant did not accept the counter-proposal, it was no longer bound by the terms of the original offer (*Malayan Flour Mills Bhd v. Saw Eng Chee*; foll). (paras 15 & 17)

**(3)** Since the acceptance of the offer was conditional, no *consensus ad idem* had been reached between the parties. The *animus contrahendi*, *ie*, the intention to be immediately bound by the agreement could only be formed if the plaintiff had accepted, without qualification, the defendant's original offer and similarly, if the defendant had accepted without qualification the plaintiff's counter offer. In either case, the acceptance by either party would convert the offer or the counter offer into a promise and therefore, the creation of a valid contract. This process could of course go back and forth between the parties until they reach *consensus ad idem* but the moment one party rejects the last of the counter offers and calls off the negotiation, then that would be the end of their legal relationship. (para 18)

**(4)** It was incorrect to say that cl. 3A was not a fundamental term. It was a material departure from the original terms and conditions set out in the draft sale and purchase agreement. In any event, it was immaterial if the new term was fundamental or otherwise as the law requires acceptance to be "absolute and unqualified". The acceptance must extend to all terms of the proposal. Adding a new term with a new condition would have the effect of qualifying the acceptance. (para 19)

**(5)** An offeree is not at liberty to add fresh terms to the offer at his whim and fancy. He does that at his own peril. The defendant had no duty to inform the plaintiff that it was not agreeable to the new terms. Neither was the defendant obliged to comment on the new terms. It was the plaintiff's duty to obtain the defendant's assent before inserting the proposed cl. 3A in the draft agreement. The original offer was therefore revocable at the defendant's option. Since the defendant's offer had been nullified by the plaintiff's counter offer, the contract could not be revived on its original terms by withdrawing the conditional acceptance. (para 20)

**Case(s) referred to:**

*Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC* ***(not foll)***

*CH Choo & Sons Sdn Bhd v. Wong Nyuk Shing @ Wong Teck Tsin [2010] 1 LNS 167 HC*

*Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC* ***(not foll)***

*Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA* ***(not foll)***

*Hyde v. Wrench (1840) 3 Beav 334* ***(refd)***

*Lai Kok Kit v. MBf Finance Bhd [2000] 3 CLJ 213 CA* ***(dist)***

*Malayan Flour Mills Berhad v. Saw Eng Chee & Anor [1997] 2 CLJ Supp 35 HC* ***(foll)***

*Tan Chee Hoe & Anor v. RamJethmal Punjabi [1983] 2 CLJ 150; [1983] CLJ (Rep) 1022 HC* ***(refd)***

**Legislation referred to:**

Contracts Act 1950, s. 7(a)

Contract Act 1872 [Ind], s. 7

**Other source(s) referred to:**
GH Treitel, *The Law of Contract*, 6th edn
*Halsbury's Laws of England*, 3rd edn, vol 8, p 75
Pollock and Mulla, *Indian Contract and Specific Relief Acts*, 12th edn, vol 1, Butterworths 2001
Visu Sinnadurai, *Law of Contract*, 4th edn, vol 1 (LexisNexis)

*For the plaintiff - L Parthiban; M/s L Parthiban, Zulkiflee & Assocs*
*For the defendant - Wong Kim Fatt (Wong Boon Chong with him); M/s Gulam & Wong*

*Reported by Kumitha Abd Majid*

## JUDGMENT

**Abdul Rahman Sebli J:**

**[1]** The plaintiff's claim is for specific performance of an agreement for the sale and purchase of a piece of land together with the building erected thereon known as Lot 20952 Geran 437503 Township of Johor Bahru ('Lot 20952') which was aborted. The building that stands on Lot 20952 is the defendant, Hotel Rasa Sayang Sdn Bhd. At the conclusion of the trial I dismissed the plaintiff's claim with costs. The central and determinative issue is whether by adding new terms to the draft sale and purchase agreement the plaintiff had abrogated the defendant's offer, leading to a failure of acceptance within the meaning of s. 7(a) of the Contracts Act 1950 ('the Contracts Act'). This is elementary contract law.

**[2]** I do not propose to deal with the testimonies of the witnesses called by both sides as the agreed facts are sufficient to cover all the agreed issues for determination. Their testimonies do not add anything new to the facts that are necessary for this purpose. The agreed facts are as follows. The plaintiff and the defendant are both companies incorporated under the Companies Act 1965. They had agreed to enter into a sale and purchase agreement in respect of Lot 20952. The agreed purchase price was RM19 million and the plaintiff had paid a deposit of RM1.9 million towards the purchase price. A cheque for that sum was issued in the name of the defendant but was never banked in by the defendant. It was returned to the plaintiff's solicitors on 12 April

2012 by the defendant's solicitors. It is common ground that this cheque could only be released to the vendor defendant upon execution of the sale and purchase agreement by both parties. That never happened as no agreement was executed between the parties on terms and conditions that had been mutually agreed upon.

**[3]** The dispute arose this way. In pursuance of the parties' desire to enter into the sale and purchase agreement the defendant's solicitors forwarded a draft sale and purchase agreement by e-mail to the plaintiff's solicitors M/s SC Teh & Azura on 6 April 2012. The following day the plaintiff's solicitors returned the draft agreement to the defendant's solicitors by e-mail for "comments" but not before inserting a new cl. 3A. This clause consisted of four entirely new terms broken down into 15 sub-clauses which added eight extra pages to the original draft sale and purchase agreement. It included giving the plaintiff a wide power of attorney including powers of conversion and sub-division of the defendant's land as well as its management, improvement and development other than the removal of caveats and delivery of documents.

**[4]** The new terms were not and were never accepted by the defendant at any material time. Of particular objection to the defendant was para. 3A.3 which required the defendant to deliver to the plaintiff's solicitors the following documents within 14 days:

(1) Vendor's Form 24, Form 44, Form 49, memorandum and articles of association (certified true copies);

(2) Vendor's shareholders' and directors' resolution resolving that the vendor do sell to the purchaser the property at the purchase price and upon the terms and conditions contained in the agreement (certified true copies or extract);

(3) Issue document of title to the property (photocopy);

(4) Discharge of charge to discharge the legal charge under presentation No. 31265/1996 Jilid 3598 Fol. 74 dated 21 May 1996 favouring OCBC Bank Malaysia Berhad (certified copies);

(5) Withdrawal of private caveat for the private caveat by Orex Point Sdn Bhd under presentation No. 6773/2008 dated 7 March 2008 (certified true copies);

(6) Withdrawal of private caveat for the private caveat by Sharikat Johor Tenggara Sdn Bhd under presentation No. 21607/2009 dated 1 July 2009 (certified true copies);

(7) Withdrawal of private caveat for the private caveat by Chua Ho Seng under presentation No. 8878/2011 dated 21 March 2011 (certified true copies);

(8) Presentation receipt issued by the land registry for the documents stated in cl. 3B.1.4 to 3B.1.7 herein above (certified true copies); and

(9) Quit rent and assessment for the current year (certified true copies).

**[5]** Having rejected the additional terms the defendant proceeded to cancel the draft agreement and returned the cheque deposit of RM1.9 million to the plaintiff's solicitors. The plaintiff's contention is that the defendant had no right to do so as there was already a concluded contract between the parties. The defendant contended otherwise, arguing that no contract had existed as the plaintiff had qualified its acceptance of the offer.

**[6]** The agreed issues to be tried are as follows:

(a) Whether the plaintiff and the defendant had reached a final and concluded contract for the sale and purchase of Lot 20952 on terms and conditions agreed by both parties.

(b) Whether the defendant can withdraw from the sale and purchase agreement after the defendant had received and kept the deposit cheque of RM1.9 million from the plaintiff for one month when the defendant did not agree with the inclusion of cl. 3A by the plaintiff.

(c) Whether the inclusion of cl. 3A to the draft agreement is a counter offer by the plaintiff, giving the defendant a ground for cancelling the proposed sale and purchase agreement.

**[7]** All three issues are intertwined and related to the question whether the inclusion of cl. 3A by the plaintiff amounted to a counter-offer and if so whether it had the effect of nullifying the proposal made by the defendant. As to the question of whether cl. 3A is a counter-offer the plaintiff admits in paras. 5 and 6 of the statement of agreed facts that it was a counter-offer. The

plaintiff is therefore bound by the agreed facts: *CH Choo & Sons Sdn Bhd v. Wong Nyuk Shing @ Wong Teck Tsin* [2010] 1 LNS 167; [2010] 9 MLJ 176. The issue must therefore be decided on the premise that cl. 3A is a counter-offer by the plaintiff. Even without the admission it is clear that cl. 3A is a counter-offer.

**[8]** What in law is meant by an offer? In G.H. Treitel's *The Law of Contract* 6th edn. the learned authors explained the meaning as follows at p. 8:

> An offer is an expression of willingness to contract on certain terms made with the intention (actual or apparent) that it shall become binding as soon as it is accepted by the person to whom it is addressed. It may be made expressly or by conduct and may be addressed either to an individual, or to a group of persons, or to the world at large.

**[9]** Next comes the question when does an offer or a proposal (they mean the same thing) turn into a promise binding on the offeror? The answer is in s. 7(a) of the Contracts Act which provides as follows:

> 7. Acceptance must be absolute
>
> In order to convert a proposal into a promise the acceptance must:
>
> (a) be absolute and unqualified.

**[10]** The word "absolute" is not defined by the Contracts Act but the *Oxford Dictionary of Law* 7th edn. defines it to mean "complete; unconditional; not relative or qualified". The Contracts Act is modelled on the Indian Contract Act of 1872 and s. 7 of both Acts are in *pari materia*. In Pollock and Mulla on the *Indian Contract and Specific Relief Acts* 12th edn. Vol. 1 Butterworths 2001 the learned authors have this to say on absolute and unqualified acceptance at p. 199:

> A valid acceptance of proposal must be absolute and unconditional. It must extend to all terms of a proposal. If the purported acceptance is conditional or qualified, it does not create a contractual relationship. It becomes a counter-proposal, which may become a contract on the terms offered by the offeree if the proposer accepts it. Such an acceptance would revoke the offer, and the contract cannot be revived on original terms by withdrawing the conditional acceptance. A bid can be revoked by notice if it has been accepted provisionally or with conditions.

**[11]** At p. 202 under the heading 'COUNTER-PROPOSAL' the learned authors went on to say: A

> An acceptance with a variation in terms of the proposal or with a qualification is a counter-proposal, which must be accepted by the original offeror before a contract is made. B

**[12]** Professor Visu Sinnadurai, a former High Court Judge in his book *Law of Contract* 4th edn. Vol. 1 (LexisNexis) dealt with the issue of counter-offer in the following terms at para. 2.19:

> [2.19] Acceptance subject to new terms: counter offer. In certain cases, the courts may consider the purported acceptance that is qualified by the introduction of a new term as a counter-offer destroying the original offer. In such cases, where the purported acceptance has been couched in terms suggesting the introduction of a new term, it has been held to be a counter-offer. See also the Indian case of *Moolji Jaitha & Co v. Seth Kirodimal* and the English case of *British Road Services v. Arthur V Crutchley & Co, Butler Machine Tool Co Ltd v. Ex-Cell O Corp (England) Ltd*; and *Compania de Navegacion Pohing SA v. Sea Tanker Shipping (Pte) Ltd, the Buena Trader.*

**[13]** Thus the introduction of a new term may be considered as a counter-offer "destroying the original offer". This accords with s. 7(a) of the Contracts Act which requires acceptance to be "absolute and unqualified". In *Tan Chee Hoe & Anor v. RamJethmal Punjabi* [1983] 2 CLJ 150; [1983] CLJ (Rep) 1022; [1983] 2 MLJ 31 the applicants had merely added the words "who will hold the same as stakeholders" after the words "Advani Hoo Morris & Kumar" (the name of the solicitors firm) on the signed acceptance copy of the offer but it was held by the High Court of Singapore that the applicants had introduced a material fresh term which amounted to a counter-offer that was not accepted by the respondent. In his judgment Wee Chong Jin CJ cited the following passage in vol. 8 *Halsbury's Laws of England*, 3rd edn. at p. 75:

> In order to constitute acceptance the assent to the terms of an offer must be absolute and unqualified ... If the acceptance is conditional, or any fresh term is introduced by the person to whom the offer is made, his expression of assent amounts to a counter-offer, which in turn requires to be accepted by the person who made the original offer.

**[14]** An offer is made only once. The rest are counter-offers. In the context of the present case the proposal is the defendant's offer to sell Lot 20952 to the plaintiff on terms and conditions contained in the draft sale and purchase agreement prepared by the defendant's solicitors. Did the plaintiff accept the proposal without qualification in order to bind the defendant with its offer? On the facts I must say at the outset that the plaintiff's acceptance of the proposal was not absolute as it was conditional upon the defendant agreeing to the new cl. 3A. There can be no argument that cl. 3A is a material variation from the draft agreement, which at any rate is more substantial than the variation in *Tan Chee Hoe & Anor* (*supra*).

**[15]** By introducing the new cl. 3A the plaintiff was in fact making a counter-offer, thereby reversing its role from being offeree to that of offeror. It was the defendant's call whether to accept the counter-proposal, conditionally or absolutely. If the defendant were to accept the plaintiff's counter-proposal it would be a contract on terms offered by the plaintiff. As the defendant did not accept the counter-proposal, it was no longer bound by the terms of the original offer.

**[16]** The plaintiff's argument that a concluded contract had been created is based on the following authorities: *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133; [1994] 2 MLJ 754; *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327; *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498; [2007] 2 MLJ 746. With due respect none of the cases are relevant as they are cases on agreements that are 'subject to contract' where the parties had actually reached *consensus ad idem* although they had yet to execute a more formal document. It is clear in those cases that contractual relationships were already in existence between the parties. The case of *Lai Kok Kit v. MBf Finance Bhd* [2000] 3 CLJ 213; [2000] 3 MLJ 136 cited by the plaintiff is likewise irrelevant as it is a case on impossibility of performance after execution of the contract. The present case stands on a different footing altogether. It concerns a failure of acceptance, negating the existence of a concluded contract.

**[17]** In *Malayan Flour Mills Berhad v. Saw Eng Chee & Anor* [1997] 2 CLJ Supp 35; [1997] 1 MLJ 763 Kang Hwee Gee J (as he then was) relying on *Hyde v. Wrench* (1840) 3 Beav 334 held on the facts of the case that the counter-offer by the plaintiff had diverted the mind of the defendant away from his original offer such that it could legitimately be assumed that he was no longer minded to keep the offer open, the effect of which was the same as if he had withdrawn that offer. Admittedly this case involved a variation in the subject matter of the original offer but the principle in my view is applicable to the factual matrix of the present case as both cases involve a counter-offer.

**[18]** It was further argued that the incorporation of cl. 3A was necessary as the property was still encumbranced with several caveats including one by Ambank for a sum of RM4.3 million. That may well be the case but it does not alter the fact that since the acceptance of the offer was conditional, no *consensus ad idem* had been reached between the parties. The *animus contrahendi*, ie, the intention to be immediately bound by the agreement could only have been formed if the plaintiff had accepted without qualification the defendant's original offer and similarly if the defendant had accepted without qualification the plaintiff's counter-offer. In either case the acceptance by either party would convert the offer or the counter-offer into a promise and therefore the creation of a valid contract. This process could of course go back and forth between the parties until they reach *consensus ad idem* but the moment one party rejects the last of the counter-offers and calls off the negotiation that would be the end of their legal relationship.

**[19]** It was finally argued that cl. 3A is not a fundamental term and that if the defendant had informed the plaintiff of its disagreement prior to the cancellation the plaintiff would have agreed to withdraw the said cl. 3A. I find no substance to the argument. First of all it is incorrect to say that cl. 3A is not a fundamental term. It is a material departure from the original terms and conditions set out in the draft sale and purchase agreement. In any event it is immaterial if the new term is fundamental or otherwise as the law requires acceptance to be "absolute and unqualified". The acceptance must extend to all terms of the proposal. Adding a new term with a new condition will have the

effect of qualifying the acceptance. A term means any provision forming part of a contract: see the *Oxford Dictionary of Law* (*supra*) at p. 545. Clause 3A is one such provision.

**[20]** Secondly the defendant had no duty to inform the plaintiff that it was not agreeable to the new terms. Neither was the defendant obliged to comment on the new terms. It was the plaintiff's duty if at all to obtain the defendant's assent before inserting the proposed cl. 3A in the draft sale and purchase agreement. An offeree is not at liberty to add fresh terms to the offer at his whim and fancy. He does so at his own peril. The original offer was therefore revocable at the defendant's option. Thirdly as the defendant's offer had been nullified by the plaintiff's counter-offer the contract cannot be revived on original terms by withdrawing the conditional acceptance: *Pollock and Mulla* (*supra*).

**[21]** For reasons aforesaid the plaintiff's claim must be dismissed with costs.